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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-fourth session

SUMMARY RECORD OF THE 450th MEETING

Held at the Vienna International Centre, Vienna,
on Monday, 17 June 1991, at 2 p.m.

Chairman: Mr. SONO (Japan)

CONTENTS

International payments: draft Model Law on International
Credit Transfers (continued)

Article 5 (continued)

Article 6

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Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

The meeting was called to order at 2.10 p.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS
(continued) (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

Article 5 (continued)

1. The CHAIRMAN invited the Commission to consider article 5(a) and article 5(b)(i) to (ii).

2. Mr. CRAWFORD (Canada) said that, as the observer for Finland had indicated at the previous meeting (A/CN.9/SR.449, para. 64), there did appear to be a conflict between article 5(b)(ii) and article 17(2). Article 5 had not been in the draft Model Law for long and an understanding of its intent and scope was still developing. His interpretation of the words "another bank" in article 5(b)(ii) was that they referred to a bank with which the receiving bank did not have an existing banking relationship. Article 5(b)(iii), it would be noted, referred to the central bank of the State where the receiving bank was located and in that case the rule operated simply: the receiving bank was paid when it received settlement at its country's central bank. That was unquestionable. In the case contemplated in article 5(b)(ii), however, if the words "another bank" referred to a situation in which the receiving bank was offered as settlement a credit at a bank with which it had no account or central bank relationship, naturally it would be careful about accepting the credit. Accordingly, in that case the rule had to be carefully expressed along the following lines: if the receiving bank was offered settlement on the books of a bank which was not its settlement bank or a bank with which it had an established relationship, then the settlement would be regarded as payment only when the receiving bank used it.

3. If a banker-and-customer relationship had already been established by the receiving bank with the other bank, the case would probably be covered by article 17(2), so that the insolvency example given by the Government of Finland in its written comments (A/CN.9/347, p. 19) might be decided under that provision. To cover the case where such a relationship had not been established, it was better to have the rule in article 5(b)(ii), with the risk of occasional unacceptable consequences, than to have no rule at all.

4. Mr. BHALA (United States of America) said that the solution envisaged by the Canadian representative to the possible conflict between article 5(b)(ii) and article 17(2) would work well. There were now two ways of dealing with the matter. He did not believe it necessary to talk in terms of the deletion of article 17(2); the Commission was at present talking about a relatively limited problem and must be careful not to perform radical surgery on the Model Law. The idea to preface the introductory wording to article 5 with the words "for the purpose of this Model Law" was acceptable and would cater for the insolvency situation.

5. Mr. DE BOER (Netherlands) thought that if the Canadian suggestion was that article 5(b)(ii) should include the words "another bank with which there is no established relationship", difficulties would arise in determining with

(Mr. De Boer, Netherlands)

certainly whether there was an established relationship or not. It would be unwise not to limit the scope of article 5. The Model Law could not be considered in isolation from insolvency law; the latter did not generally refer to the time of a payment, but either to the general law of obligations or to a specific law of obligations such as the Model Law. It would not be enough to include the words "for the purpose of this Model Law" in the introductory wording to article 5 in order to exclude the operation of insolvency law: that intention must be made explicit.

6. Mr. ERIKSSON (Observer for Sweden) said that the provisions of article 5 were clearly needed in relation to articles 6 and 8, but they caused some problems in relation to articles 13 and 17. Nothing that had been said in the discussion of article 5 had convinced him that the provisions of article 5 were needed for any reasons other than those related to articles 6 and 8.

7. At the previous meeting (A/CN.9/SR.449, para. 57), the United States representative had indicated that the Commission should look ahead to broader possible applications of the Model Law. He could not agree with that approach. The Commission must take care not to introduce into the Model Law rules that might have consequences that could not be foreseen at the moment. It should confine itself to applying the provisions of article 5 in relation to articles 6 and 8.

8. Mr. BHALA (United States of America) said that the Commission had not considered the effect of excluding the operation of article 5 in respect of all situations except deemed acceptance. Moreover, his delegation was not seeking to prejudice the application of local insolvency law.

9. Mr. ABASCAL ZAMORA (Mexico) said that he had difficulty in understanding the connection of article 5 with article 17(2) since in his view they related to different matters: article 5 referred to the stage when a sender fulfilled the obligation to pay and article 17(2) to the stage when a transfer was completed and the obligation of the originator was discharged.

10. The CHAIRMAN called for comments on article 5(b)(iii).

11. Mr. LE GUEN (France) said that in his delegation's view article 5(b)(iii) as it stood was too restrictive in using the words "when final settlement is made in favour of the receiving bank at the central bank of the State where the receiving bank is located". From 1993 onwards any bank in a country in the European Economic Community would be able to carry out any banking operations in any other EEC State, even if it did not have a physical presence in that other State. The Community's central banks might therefore have to open accounts with, and include in their payments systems, commercial banks which were not physically located in their own State.

12. His delegation therefore wished article 5(b)(iii) to be drafted in broader terms along the following lines: "when final settlement is made in favour of the receiving bank by a central bank with which the receiving bank has an account". Without such an amendment, if the receiving bank was located

(Mr. Le Guen, France)

in the same State as the central bank settlement by the central bank would be immediate, whereas if it was located in a different State settlement would take place under article 5(b)(ii), i.e. on the following business day. He saw no reason why there should be a one-day difference in the time of comparable settlements by central banks merely because of their geographical location.

13. Mr. HARRIS-BURLAND (Commission of the European Communities) supported the French proposal. The suggested wording would apply to two situations not at present covered by article 5(b)(iii). The first was when the receiving bank had a branch in a State and that was the branch involved in the credit transfer; it might be that the head office of the receiving bank was in a different State. The branch might have an account with the central bank in its own country, but under article 5(b)(iii) as it stood that would not count, since the central bank making the settlement had to be that of the country of the receiving bank itself and not that of the country of its branch. Extending the scope of article 5(b)(iii) as suggested would take account of the situation in which a branch of the receiving bank had an account with the central bank in the State where the branch was located. That was not to imply that central banks had to open accounts with such branches nor that branches should seek to have such accounts, but if they did, article 5(b)(iii) should be worded so as to cover the situation.

14. The other situation he had in mind was when the receiving bank did not have a presence in the territory of the central bank in which settlement was made but maintained an account relationship with it. In such cases there should be no objection to final settlement being possible under article 5(b)(iii).

15. The CHAIRMAN asked the Commission whether it considered that a branch or a separate office of a bank should be treated as a separate bank for the purpose of article 5.

16. Mr. CRAWFORD (Canada) said that he had had instructions to agree to that suggestion but nevertheless thought it a novel arrangement for branches of a single bank located in the same State to have separate accounts at its central bank.

17. Mr. SCHNEIDER (Germany) pointed out that a distinction must be made between the provision of cross-border services by banks and their having branches in other countries. It would not be enough merely to add that branches were regarded as separate banks for the purpose of article 5. The EEC Second Banking Directive allowed the provision of cross-border financial services without the establishment of branches. He therefore supported the French proposal.

18. Mr. GREGORY (United Kingdom) said that, for the purpose of article 5, branches of the same bank should be treated as separate banks. That made sense, since in other provisions of the Model Law which related to time there was generally a rule that branches of banks should be considered as separate

(Mr. Gregory, United Kingdom)

banks. His delegation approved the French proposal and did not think it was incompatible with providing that branches should be treated as separate banks.

19. Mr. BURMAN (United States of America) said that his delegation also supported the French proposal.

20. Mr. EFFROS (International Monetary Fund) said that the Commission should consider article 5(b)(iii) not only within the context of the European Economic Community but also in regard to central banks located elsewhere. If a receiving bank had an account with a central bank and that account was blocked by exchange controls, as could happen in some countries outside the Community, a credit to that account which was not freely available should not be regarded as a final settlement. The Commission should therefore consider amending article 5(b)(iii) in the manner proposed by France but with the words "that is freely available for use", or wording to that effect, added at the end.

21. Mr. LE GUEN (France) said that the changes suggested by the International Monetary Fund would not affect the European Economic Community but would have serious consequences for central banks. Some countries had mandatory reserves, in other words, deposits which commercial banks must maintain at central banks. He understood the point about exchange controls but believed that, if it accepted the change in question, the Commission might well create confusion about the time when payment was made by a central bank in a situation in which the amount of the payment equalled the amount of the monetary resources which the receiving bank had to maintain at the central bank. Consequently, he opposed the text suggested by the International Monetary Fund.

22. Mr. HARRIS-BURLAND (Commission of the European Communities) said that the point made by the International Monetary Fund was also relevant to article 5(b)(ii) in connection with a credit entered to an account of the receiving bank in another bank. He supported the French representative's view that the Commission should not accept the text suggested by the Fund.

23. The CHAIRMAN said that if he heard no objection, he would take it that the Commission adopted the French proposal for article 5(b)(iii).

24. It was so decided.

25. The CHAIRMAN invited the Commission to consider subparagraph (b)(iv) of article 5.

26. Mr. PELICHET (Hague Conference on Private International Law) said that in its written comments (A/CN.9/347, p. 71), the Conference had proposed the deletion of the words "applicable law and". He recalled that during its discussion of the provision, the Working Group had expressed doubts about the reference to applicable law. It was not possible to speak of interbank netting arrangements and applicable law in the same provision since there was no particular national law to which multilateral netting settlements could be subject.

27. Mr. CRAWFORD (Canada) said that his delegation supported the proposal. He thought it unnecessary for the Commission to investigate the manner in which national legal systems might regulate interbank netting schemes. For the purposes of the Model Law, it might be assumed that any bilateral or multilateral netting scheme to which banks in countries adopting the Model Law were a party would have a satisfactory foundation in the legal system of the country concerned.

28. Mr. LE GUEN (France) said that his delegation also supported the proposal. It did not think that all netting systems were capable of offering guarantees of efficiency. The work done by the Committee on Interbank Netting Schemes of the Central Banks of the Group of Ten Countries showed clearly the need for caution in that regard. The Committee had recommended a list of minimum criteria to be met by netting systems in order for them to be regarded as valid by central banks. That suggested the possible existence of netting systems which did not meet those criteria.

29. Mr. FUJISHITA (Japan) said that his delegation thought that the entire provision should be deleted. However, if the majority of the Commission wished to retain it, Japan would agree to that and to the proposal made by the Permanent Bureau of the Hague Conference.

30. Mr. NEWMAN (United States of America) said that his delegation also supported the Hague Conference proposal.

31. With regard to the French representative's comments about unsatisfactory netting schemes, he did not believe that a new netting scheme would be approved by a central bank unless it met the guidelines set out in the document prepared on the subject by the International Monetary Fund.

32. Mr. VASSEUR (Banking Federation of the European Community) said that his delegation also supported the proposal. It welcomed the fact that the Model Law referred to bilateral and multilateral netting systems. It hoped that the Commission's report would contain the recommendation made by the Working Group on International Payments (A/CN.9/344, p. 14, para. 61) that national legislators should review domestic laws, especially laws dealing with bankruptcy and insolvency, with the objective of supporting interbank netting of payment obligations.

33. Mr. LE GUEN (France) said that he did not share the United States representative's view that a central bank would not approve an inefficient netting system. There was no legal obligation, at least under French law, for netting systems to meet the minimal criteria set out in the report of the Group of 10. A netting system was essentially a contract between participating banks and they therefore had the right to organize themselves as they wished. The report of the Group of 10 said that central banks should have the right to supervise netting systems and in some cases the right to say that such systems did not meet the minimum criteria, but it did not actually recommend a control mechanism. His delegation did not want a substandard netting system to be treated under article 5(b)(iv) as if it were making valid payments. He therefore proposed the addition at the end of article 5(b)(iv), to govern the

(Mr. Le Guen, France)

entirety of sub-subparagraph (iv), of the words "provided the rules governing the system are compatible with this law", or wording to that effect.

34. Mr. CRAWFORD (Canada) said that, while he understood the desire of the French delegation that aberrant netting systems should not be recognized, it would be wrong for the provision to be worded in such a way that it afforded the possibility of a broad inquiry as to whether the rules of a given system were compatible with the Model Law. All central banks were well aware of the recommendations of the Group of 10 and multilateral settlement schemes were under the supervision of central banks everywhere. An alternative to the French proposal might be to provide that bilateral and multilateral netting schemes were to be considered acceptable provided that they were acceptable to the central banks of the places where they operated.

35. Mr. NEWMAN (United States of America) agreed with the representative of Canada as far as multilateral funds transfer systems were concerned. The question of bilateral netting schemes was quite a different matter; in that case, two banks exchanging messages and settling net were of no concern to central banks.

36. Mr. CRAWFORD (Canada) replied that in countries where the capital adequacy rules of the Bank for International Settlements were being enforced vigorously, central bank supervisors were very interested in bilateral netting arrangements because banks relied on them to depress their net claims against other banks to their net amount.

37. The CHAIRMAN observed that the supervisory authorities envisaged in the suggestion by the representative of Canada might not exist in all States. If the wording suggested by France was altered to read "the law" instead of "this law", the point would be covered.

38. Mr. LE GUEN (France) said that his delegation believed that, although some netting systems were very new, netting systems should be mentioned in the Model Law in order to accord them some sort of recognition. With such a complicated matter, however, it was necessary to proceed very cautiously. The Chairman's suggestion to change the words "this law" to read "the law" was open to the objection that for multilateral netting systems to be effective they must be legally valid, possibly under several different legal systems; the words "the law" could give rise to the operation of a whole range of laws, a situation which would be conducive to uncertainty.

39. Mr. GREGORY (United Kingdom) endorsed the views expressed by the representatives of Canada and the United States. His delegation's preference was for leaving the text as it stood but with the deletion of the words "applicable law and". The question of the validity of bilateral or multilateral netting systems could safely be left to be determined by whatever rules were valid under the system applicable to them in the different countries concerned; in many countries they would be subject to supervision on an individual basis by central banks or some other body.

40. Mr. TCHERNYCHEV (Union of Soviet Socialist Republics) agreed.
41. The CHAIRMAN said that, unless he heard any objection, he would take it that the Commission approved the text of article 5(b)(iv) with the deletion of the words "applicable law and".
42. It was so agreed.
43. The CHAIRMAN reminded the Commission that it should take a decision on the recommendation by the Working Group to which the observer for the Banking Federation of the European Community had referred. He suggested that the Commission should state in its report that, in adopting article 5(b), it had taken note of the Working Group's recommendation.
44. It was so agreed.
45. The CHAIRMAN invited the Commission to consider article 5(c).
46. Mr. BERGSTEN (Secretary of the Commission) said that the observer for The Hague Conference on Private International Law had informed him that the suggestion made by the Permanent Bureau of the Conference to delete article 5(c) (A/CN.9/344, p. 32) might be taken care of instead through drafting the provision in such a way as to make it clear that it referred to rules of law generally. The observer for The Hague Conference had made an alternative suggestion with regard to subparagraph (c), namely to restructure article 5 by inserting, in the introductory wording to the article, words to the effect that payment should take place in accordance with subparagraph (a) or subparagraph (b), thereby obviating the need for subparagraph (c) altogether.
47. The CHAIRMAN said that was an interesting suggestion but it went beyond the scope of the present discussion. His own suggestion was that a form of words such as "for the purposes of this Model Law" should be introduced in such a way as to apply not only to article 5 but to articles 6 and 8 as well. The Commission might wish to reflect on the implications of that suggestion and in the meantime take up article 6.

Article 6

48. Mr. CRAWFORD (Canada) said that the concept of deemed acceptance had been incorporated in the draft in an attempt to guard against the vice of inertia which affected the operation of the international banking system. In his view, that left the problem solved in an unacceptable manner. It might be better to punish the vice of inactivity instead of deeming it to be something which it was not.
49. On very practical grounds, senders of payment orders might feel that the Model Law gave them less than they deserved if, through the operation of its deemed acceptance rule, they found that they had an unwilling representative in a bank abroad. A receiving bank which was bound to implement a payment order only by virtue of having missed the deadline for rejecting it was a poor representative of the sender and an unwilling participant in the credit

(Mr. Crawford, Canada)

transfer. In his view, that kind of delay in executing a payment order should be penalized in a way which affected the receiving bank only, and not, as would be the case under the existing penalty provisions in the Model Law, the sender as well. He therefore recommended providing for an interest penalty based on the length of delay.

50. Mr. BHALA (United States of America) said that the representative of Canada had summarized the problem perfectly and had shown why the remedies at present available in regard to article 6(2)(a) and article 8 were unsatisfactory. He felt that the Canadian proposal was a satisfactory basis on which to advance. It was a good idea to treat inactivity as a delay problem, an area in which the Model Law worked well, rather than penalize the sender by attaching him to a receiving bank that was pursuing his interests in a dilatory manner. He thought that interest on the amount of the payment order that had been delayed might be a fitting penalty.

51. Mr. NEWMAN (United States of America), speaking from an operational perspective, said that very few banks processed payment orders on a real-time on-line basis; most still used the batch mode. That meant that, for several reasons, it was not until the following morning that they knew whether they had funds available to execute payment orders or whether there were problems entitling them to reject a payment order on the execution date. It would therefore be unrealistic for the Model Law to contain a rule to the effect that a payment order was deemed accepted if the transaction had not been processed by the bank and the bank had had no opportunity to reject it.

52. Mr. GREGORY (United Kingdom) said that the Canadian proposal merited consideration. It was his understanding, however, that the rules regarding deemed acceptance entailed that a payment order must either be accepted or rejected: a bank receiving a payment order was under an obligation to take action, as distinct from an obligation to pay compensation. His delegation had proposed in its written comments (A/CN.9/347, p. 57) the addition to article 6 of a paragraph 2 his providing for an extra day for rejection of a payment order.

53. Ms. KOSKELO (Observer for Finland) said that in her view the only penalty arising from late execution following deemed acceptance would be payment of compensation for interest. In the light of the considerations put forward by the United States delegation there might be some advantage in clarifying the circumstances in which deemed acceptance could be claimed to have occurred and in which consequential damages might be payable due to failure by the receiving bank to take action. The proper context for such a discussion would be paragraph 8 of article 16. It should be borne in mind that the concept of deemed acceptance was very useful in ensuring that banks fulfilled their obligations, but banks must also be afforded the possibility of rejecting a payment order.

54. Mr. BHALA (United States of America) said that the Canadian proposal was a significant contribution to the discussion. The point to be emphasized was that a receiving bank had a duty to give notice of rejection, as was affirmed by the existing text of article 6(3).

55. Mr. NEWMAN (United States of America) said that article 6(3) should make provision for an additional day for rejection, thus taking account of the point made by the representative of the United Kingdom.

56. Mr. GREGORY (United Kingdom) said that in some, but not all, cases an extra day allowed for rejection would be excessive. Problems arose only in the case of deemed acceptance: other methods of acceptance all required the receiving bank to take specific action for which it should not need any additional time for reflection. His delegation's suggestion was merely to take into account those cases in which the extra day was in fact needed for rejection.

57. Mr. POTYKA (Observer for Austria) said that, in practice, a bank could not be deemed to have accepted a payment order if it had not had time to process the order, and that should be the criterion in establishing time-limits. His delegation supported the suggestion made by the United States, in the interests of avoiding unnecessary complexity in the Model Law.

58. Mr. ABASCAL ZAMORA (Mexico) said that the Canadian proposal should be explored in greater depth, particularly in view of the considerations raised by article 8 and the need to ensure restitution in the event of negligence on the part of a bank which failed to execute a payment order without stating that it had rejected it. He did not think that the issue was the same as that raised by article 16. If there was to be a notion of deemed acceptance, there should equally be a notion of deemed rejection.

59. Mr. SCHNEIDER (Germany) said that the rule applicable in the countries of the European Economic Community was for a two-day time-limit, which would adequately meet the concerns of both the United States and the Austrian delegations. However, a solution might be found in the context of article 10.

60. The CHAIRMAN said that the deemed acceptance approach seemed, despite some divergences of view, to enjoy broad support, but that adjustments would have to be made to take account of concerns relating to time-limits.

The meeting rose at 5.05 p.m.

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Twenty-fourth session

SUMMARY RECORD OF THE 451st MEETING

Held at the Vienna International Centre, Vienna,
on Tuesday, 18 June 1991, at 9.30 a.m.

Chairman: Mr. SONO (Japan)

CONTENTS

International payments: draft Model Law on International
Credit Transfers (continued)

Article 6 (continued)

Article 10

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The meeting was called to order at 9.40 a.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS
(continued) (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

Article 6 (continued)

1. The CHAIRMAN recalled that, in the course of the discussion of article 6 at the previous meeting, there had been a clear majority in favour of the concept of "deemed acceptance". That had been the decision reached, although alternative paths favoured by some delegations had been examined. It had become clear that the concerns of all could be accommodated and the desired goal achieved by adjustments to the timing contained in the existing rules.
2. Mr. GREGORY (United Kingdom) said there was no doubt that the main concern was one of timing. He agreed with the suggestion by the United States representative that a possible solution was the provision of an extra day for notice of rejection. Consequently, on behalf of his own delegation and of the delegations of Canada and the United States of America, he proposed the insertion of the words "the business day following" in the last sentence of article 6(3) before the words "the execution date". A consequential change to article 6(2)(a) was then needed, the words "execution under article 10" being replaced by "giving notice of rejection under paragraph (3) below".
3. Thus, if the bank accepted a payment order, it would do so under subparagraphs (b), (c) and (d). If it did not act, the first question would be whether subparagraph (a) applied, with due regard for paragraph 3 and whether payment had been received.
4. Where an extra day was already allowed under article 5 in respect of certain means of payment, the times allowed in articles 5 and 6 would run concurrently, there being no question of adding any other additional days to the time period.
5. Mr. POTYKA (Observer for Austria) said he supported the proposal to add an additional day in article 6(3). However, as the representative of Germany had indicated, the issue should also be considered in connection with article 10. If an extra day were allowed for the rejection of a payment order, a bank might have the duty under article 10 to execute a payment order that it had not yet accepted. The problem could be solved by allowing an additional day for execution under article 10.
6. The CHAIRMAN suggested that discussion of the effect of the proposal on article 10 should be postponed until the proposal had or had not been accepted.
7. Mr. VASSEUR (Banking Federation of the European Community) said that he wished to draw the Commission's attention to the interrelationship between the Model Law and national legislation dealing with money-laundering in relation to organized crime. Many countries had laws which required banks to report suspected instances of money-laundering. In such a case, they were required

(Mr. Vasseur, Banking Federation of the European Community)

to suspend execution of the credit transfer or payment order. If so ordered by a court, the suspension might be for an extended period. The preferred procedure, however, was that the bank concerned should not reject the payment order but execute it, if all was in order, after a period of, perhaps, several days.

8. That procedure would give rise to a conflict with the Model Law, which provided for acceptance or "deemed acceptance" within a fixed time-limit. European banks were concerned that the text should be made more flexible, so that such a conflict could be avoided.

9. The CHAIRMAN said that questions such as money-laundering or foreign exchange controls were outside the scope of private law. Consequently, it had been decided that they should be excluded from the Model Law.

10. Mr. HERZBERG (Observer for Israel) said he agreed with the proposal put forward by the representative of the United Kingdom. He suggested, however, that the Drafting Group should address the question of defining "day" or "business day" in connection with time-limits. If "day" meant "business day", there was a definition in article 10(4), but the formulations varied from article to article.

11. Ms. KOSKELO (Observer for Finland) said that, if the proposal to add an extra day for acceptance in article 6(3) were adopted, it would still be necessary to provide a time of execution in the case of "deemed acceptance". For example, if a payment order were received on day one, and there were funds available in the account, the proposed article 6(3) would give rise to "deemed acceptance" on day two. It was therefore clear, as the observer for Austria had said, that a new rule was needed in article 10 to provide yet another day for execution, i.e. execution would take place on day three.

12. Mr. ERIKSSON (Observer for Sweden) said the proposal by the representative of the United Kingdom would usefully resolve the problems discussed in the previous meeting. He would be able to accept it provided that a further change in article 6(3) were made, as proposed in his Government's written comments (A/CN.9/347, p. 45) that notice of rejection should be given at the earliest possible time, since that was in the sender's interests.

13. Mr. KAKOLECKI (Observer for Poland) said that the proposed extra day would allow for the case when a payment order was received late in the day. He also supported the Swedish proposal, which would encourage notification of rejection on the same day where that was possible.

14. As for the question of money-laundering, it might, perhaps, be considered in the context of the final provisions.

15. The CHAIRMAN said that, unless there was strong support among the members of the Commission for dealing with the issue of money-laundering in the final provisions, he would assume that the Commission's basic approach remained unchanged.

16. Mr. CRAWFORD (Canada), replying to the observer for Finland, said that the proposal introduced by the representative of the United Kingdom did not entail the addition of yet another day. The key to understanding the proposal was that acceptance occurred only because it was "deemed" so to do. The duty to execute arose under article 7. If there was a failure to execute or to reject within the prescribed time-limit, then execution would be late, and a liability for value or interest would be incurred as provided for in article 16.
17. Mr. SCHNEIDER (Germany) said he had a purely editorial change to propose. Since subparagraphs (b), (c) and (d) of paragraph 2 related to the normal process of acceptance by conscious act, he proposed that they should be renumbered (a), (b) and (c). The exceptional case, "deemed acceptance", would then become subparagraph (d).
18. He agreed with the observer for Finland that it was necessary to consider the relationship between articles 6 and 10. Only one extra day was needed so that, if it were provided in article 10, there was no need for it in article 6. If two extra days were provided under article 10 and a further day under article 6, then banks would be able to wait up to three days before rejecting the payment order without any interest becoming payable; that would be very nice for the banks.
19. There was no need to deal with the question of money-laundering in the context of the Model Law. The Model Law had, of course, to be consistent with criminal and supervisory law, but that would be accommodated by appropriate interpretation and the rules for the subjection of contract law to other law.
20. Mr. HUANG Yangxin (China) said he agreed with the proposal by the representative of the United Kingdom. He also thought that the Drafting Group should consider the matter of time of acceptance, execution and rejection in relation to the Model Law as a whole.
21. It would be useful if the question of money-laundering were mentioned at the end of the Model Law.
22. U NYI NYI THAN (Observer for Myanmar) said that money-laundering was a serious factor in drug-trafficking, a problem that his Government had been combating since 1948. He agreed with the representative of China and the observers for Poland and the Banking Federation of the European Community that it should be covered in the Model Law.
23. Mr. HERZBERG (Observer for Israel) said that, while he recognized the importance of money-laundering in drug-trafficking, he thought it was a matter for national legislation and not for the Model Law.
24. The CHAIRMAN said that it was a problem to be dealt with by the proper organizations. If there were any further comments on the matter, he would ask the members of the Commission for an indicative vote.

25. Ms. KOSKELO (Observer for Finland) said that, despite the assurances given by the representative of Canada, she was still concerned about the effect on article 10 of the proposal concerning article 6(3). As she understood it, if a payment order was received and funds were available on day one, the proposal would mean that the order would be deemed to have been executed at the end of day two and, according to article 10, interest would be payable as from and including day two. It was unclear what would happen if execution actually took place on day three. The proposal did not seem to provide for an interest-free extra day.

26. Mr. NEWMAN (United States of America) said that the issue under consideration was not the receipt or payment of interest by banks, but the value date - or execution or payment date - of a payment order. The reason for proposing an extra day in article 6 was to provide for the case of payment orders that were received late in the day when the payment systems had closed down. In such a case, time was needed for investigation, which might not be completed until the following day. If an order were rejected on the day following the receipt of the credit, the bank concerned would claim one day's interest. There was no question of trying to eliminate interest: what was sought was execution on the value date and the ability, if a problem arose, to reject a payment order on the following day.

27. Mr. LIM (Singapore) said that the observer for Finland had raised a real problem of concept and drafting. Under article 6(2) and (3) as they stood before the proposed amendment, the time of execution was linked with the timing under article 10 but, if article 6 were amended to include the words "business day following" the execution date, with the consequential change in subparagraph (a), there would be a discrepancy between the two articles. Article 10 provided that the bank was required to execute the payment order on the day it was received whereas, under the amended article 6, the bank would not be required to reject an order until the day after receipt.

28. The CHAIRMAN said that the question of the interest payable, raised by the observer for Finland, could be dealt with under article 16.

29. Mr. GREGORY (United Kingdom) said that it was implicit from the structure of the Model Law and the order in which the articles appeared that execution did not have to take place until after acceptance. If that was not clearly understood, it should be made explicit.

30. In one of the examples given by the observer for Finland, where payment for an order was received on day one but the bank did nothing, no notice of rejection being given, the result was that the order was deemed to have been accepted at the end of day two and the bank was then required, under article 7, to execute the order in the time given under article 10. If article 10 had no retrospective effect but applied only from the moment of acceptance, it would be at that moment - on day two - that the bank was required to execute the order. Interest would not normally be payable from the day the payment was received but only from the day that the bank was required to execute the payment order.

(Mr. Gregory, United Kingdom)

31. As for the suggestion that a bank might gain financially by holding payment orders and then rejecting them at the end of the specified period, it was his own opinion that, if a credit transfer were not completed and the "money-back" guarantee operated, interest would have to be paid from the day the payment was received. In other words, a bank which had received a payment order with cover and then rejected it in the time allowed would have to return the money with interest, if it had held it for the two days allowed.

32. Mr. POTYKA (Observer for Austria) said that it would be a waste of time to become involved in a complicated exercise to redraft article 10(1) in order to provide an extra day, when article 6(3) provided that notice of rejection must be given not later than on the execution date. All that was needed was to provide, under article 10, for one more day for execution or rejection. That would avoid such anomalies as providing that an order could be rejected after the execution date or the date on which it was deemed to have been accepted. Acceptance should not be mingled with execution.

33. The CHAIRMAN said it seemed to be the prevailing view in the Commission that an additional day should be provided for the purposes of articles 6 and 10 and that situations in which a receiving bank would have two additional days should, if possible, be avoided. If that approach was acceptable, a small ad hoc drafting group might be set up to prepare a text.

34. Ms. KOSKELO (Observer for Finland) drew attention to the provisions concerning cut-off time in article 10(4), which should be taken into account in discussions on the need for an additional day.

35. Mr. BHALA (United States of America) said that, while he would be happy to serve in an ad hoc drafting group, it might be possible to solve the problem without one. The Commission was dealing with a very narrow problem, arising only in the event of deemed acceptance. Since execution could not take place before acceptance, there was no need for concern about execution until day two. If execution did not take place until day three, it would be with a value date of day two.

36. Mr. ADEDIRAN (Nigeria) proposed that article 6(3) should remain as it stood but that article 10(1) should be amended by the insertion of the words "but not later than the day of acceptance" before the word "unless" in the second line.

37. With regard to drug-trafficking, the conflict between the application of the Model Law and that of the national narcotics laws merited examination.

38. The CHAIRMAN said that, while the Commission attached great importance to the problem of money-laundering and drug-trafficking, it was not competent to deal with such problems, which should be left to the appropriate bodies. Having noted from a show of hands that more than two thirds of the members of the Commission agreed with that approach, he said that, if he heard no objection, he would take it that the Commission did not wish to include any rules on the subject in the Model Law.

39. It was so decided.

40. Mr. GREGORY (United Kingdom) said that his delegation was still in favour of the principle of "same-day" execution and did not, for the moment, wish to commit itself to making any adjustment to article 10 to provide an extra day. The problem the Commission had been discussing related only to the narrow issue of deemed acceptance.

41. The CHAIRMAN said that there seemed to be a general feeling that one more day might be required for execution purposes, and a number of suggestions had been made to that effect. He would prefer, however, that the appointment of an ad hoc drafting group be postponed until the debate on article 10(1) had been completed.

42. In any case, he took it that the Commission agreed, in principle, that an extra day should be provided for deemed acceptance.

43. It was so decided.

44. The CHAIRMAN invited comments on the German proposal that the order of the subparagraphs in article 6(2) be changed, subparagraphs (b), (c) and (d) being renumbered (a), (b), and (c) and subparagraph (a) becoming subparagraph (d).

45. Mr. GRIFFITH (Observer for Australia) and Mr. SAFARIAN NEMATABADI (Islamic Republic of Iran) said they supported the proposal.

46. The German proposal was adopted.

Article 10

47. Mr. SCHNEIDER (Germany) said that there were tremendous differences between the various payment systems in the world. Advanced electronic systems were used in the United States but many transfer systems in Europe were paper-based. Furthermore, many transactions in Europe were carried out not by cheque but by credit transfer. The result was that many millions of payment orders reached the European banks every day and, if the Model Law were adopted for domestic as well as international transfers, the position of small and medium banks - which would be incapable of executing all the payment orders on the day they were received - should be taken into account.

48. If, as he feared it might, the Commission accepted the "money-back" guarantee, the appropriate routing would need to be known so that the risks involved in executing a payment order could be assessed, and such inquiries took time.

49. He pointed out that, while the Commission was dealing with the problem of harmonizing international law, some parallel efforts were being made to harmonize regional law. The European Community had quite recently adopted a recommendation dealing with the question of the execution date and it had included a rule providing an extra day for execution. The banks in European countries really did need that extra day.

50. Mr. HUANG Yangxin (China) proposed that, in article 10(1), the words "on the day it is received" should be replaced by the words "on the day it is accepted".

51. The CHAIRMAN recalled the Commission's view that acceptance of a payment order was implicit in article 10(1). The Drafting Group should ensure that the final text brought that point out clearly.

52. Mr. DE BOER (Netherlands) said he supported the principle of "same-day" execution and failed to see why the rule governing cut-off time was not considered relevant thereto. He understood that banks in some countries tended to set the cut-off time very early in the day, sometimes even before opening time. That practice gave them in effect an extra day for execution.

53. Mr. SOLIMAN (Egypt) said that, when discussing the time for the execution of payment orders, the Commission should take into account the technical possibilities available to the various States. He supported the proposal that an extra day be provided for the execution of payment orders and thought that the appropriate amendment should be made to article 10(1) and not to article 6.

54. Mr. VASSEUR (Banking Federation of the European Community) reiterated his Federation's written comment (A/CN.9/347, p. 68) that the rule requiring a receiving bank to execute a payment order on the day it was received was too strict. Under the terms of the European Community recommendation of 14 February 1990, a beneficiary's bank had to execute a payment order on the day following receipt of the related funds, unless a later date was stipulated.

55. Problems might arise if there were different rules for transfers inside and outside the European Community. He therefore suggested a modification of article 10(1) to the effect that a receiving bank was required to execute a payment order not later than on the day after it was received. The time required for acceptance had obviously to be taken into account.

56. Moreover, in the Federation's view, the text should make it clear that, in accordance with article 3, agreements contrary to article 10 would be expressly permitted.

57. The CHAIRMAN pointed out that it had already been decided that acceptance must have taken place before article 10(1) would apply.

58. Mr. LE GUEN (France) said he agreed with the arguments of the German representative. To stipulate that a receiving bank would be required to execute a payment order on the day it was received would cause no problems for banks operating electronic transfer systems. However, the Model Law was intended to apply to paper-based transfers also. It was unreasonable to impose a "same-day" rule on banks carrying out the latter type of operation.

59. It seemed to be rather hypocritical to set a cut-off time so early in the day that, for example, orders received shortly after 9 a.m. would be regarded as having been received on the following day. In countries governed by civil law, it was the general rule and not the exception that was important. If a

(Mr. Le Guen, France)

judge had to apply the Model Law he would apply the general rule and, if the general rule were not appropriate for a large part of the transfers covered by the Model Law, there would be difficulties of application.

60. He therefore proposed that article 10(1) be amended to require the receiving bank to execute a payment order not later than on the day after it was received. That would not, of course, rule out execution on the day on which it was received.

61. He agreed with the observer for Austria that, if the time-limits in article 10(1) were extended by one day, all the problems arising under article 6(3) would also be solved.

62. The CHAIRMAN asked the representative of France whether he was opposing article 10(4) on the grounds that a bank could set an arbitrary cut-off time.

63. Mr. HERZBERG (Observer for Israel) said that it was common banking practice to set a cut-off time which marked the end of one business day and the beginning of the next. That was something that could not be ignored in the Model Law.

64. Mr. LE GUEN (France) said he was not opposed to article 10(4) as such. He simply did not think it desirable that the possibilities of article 10(4) be used to solve the general problem of the time of execution.

65. Mr. BHALA (United States of America) said that he agreed with the Netherlands representative that the answer was to set an appropriate cut-off time. He quite understood that different payment systems and different means of transmission were used and had not, in fact, stated that the "same-day" system should apply to paper-based transfers. There could be one cut-off time for the latter and one for electronic transfers. He was puzzled, however, at the use of the word "hypocritical" by one speaker, since he had thought there was a basic understanding regarding freedom of contract.

66. Mr. CONOBOY (United Kingdom) said he agreed with the representatives of the United States and the Netherlands concerning the relevance of the cut-off time in overcoming difficulties experienced with some payment systems in some countries. He did not believe that, as a general rule, a bank should be given an extra day to execute a payment order when it had already accepted that order and had received payment. That would build a "float" into the banking system.

67. The representative of Germany and the observer for the Banking Federation of the European Community had referred to the transparency recommendation of the European Community. That recommendation had no binding legal force. If UNCITRAL were to adopt a different rule, it was not impossible that the European Community might accept the UNCITRAL standpoint and introduce a "same-day" rule. He noted, in that connection, the comment by the Commission

(Mr. Conoboy, United Kingdom)

of the European Communities (A/CN.9/347, p. 70) that endeavours to induce banks to execute payment orders on the day they were received were, therefore, in principle to be welcomed.

68. Replying to the representative of Germany, he said that, if there were a rule stating that the receiving bank might execute a payment order on the day after it was received, it would be necessary to consider how that would affect other provisions of the Model Law, such as conditions regarding the completion of payment, discharge, etc. He supported the adoption of article 10(1) as it stood.

69. Mr. HERZBERG (Observer for Israel) said he agreed with the remarks made by the representatives of the Netherlands, the United States and the United Kingdom. Most banks had a cut-off time which reflected the possibility of executing a payment order on the business day on which it was accepted.

70. Mr. KAKOLECKI (Observer for Poland) said that it would be difficult for his Government to accept and apply such a rigid provision. He therefore supported the position of the French delegation and the Banking Federation of the European Community.

71. Mr. POTYKA (Observer for Austria) said he agreed with the views expressed by the representatives of Germany and France and with the written comments by the Government of Switzerland and the Commission of the European Communities (A/CN.9/347). He pointed out that, though the Commission of the European Communities had indicated that it would welcome endeavours to induce banks to execute payment orders on the day they were received, the subsequent paragraph had suggested that a possible compromise might take the form of stipulating that the execution of a payment order must take place no later than the following day. He also supported the French representative's view on cut-off times.

72. Mr. ERIKSSON (Observer for Sweden) said he supported the "same-day" system. It was crucial that banks be given the time they needed to decide whether to accept or reject a payment order but, if that were done, banks would not need extra time. Article 10(1) should therefore be adopted as it stood, and changes should be made only to article 6.

73. Mr. IWAHARA (Japan) said he, too, supported the "same-day" system.

74. Mr. LOJENDIO OSBORNE (Spain) said that article 10(1) should be amended to require payment orders to be executed on the day following that on which they were received. It would also be necessary to provide for the possibility of executing a payment order at an earlier date, so as to facilitate the broadest general acceptance of the Model Law.

75. Mr. BISCHOFF (Observer for Switzerland) said that, while a bank had every interest in executing payment orders on the day they were received, additional time might be needed, for instance, if the bank received a conditional order and had to consult its legal department on the subject. Moreover, under the

(Mr. Bischoff, Observer for Switzerland)

law in force in his country and others, banks were required to trace the path followed by money if there was a suspicion of laundering. That took time, so that the requirement of an extra day was quite justified.

76. Mr. LIM (Singapore) said that it was essential that traders should be able to rely on the instant execution of payments. He therefore supported the "same-day" rule. There was no need for an extra day under either article 6 or 10; if problems arose, the setting of an earlier cut-off time would provide the needed flexibility.

77. If, however, the Commission wished to provide for an extra day, article 10(1)(a) should be amended so as to allow for an earlier as well as for a later date. Alternatively, the concerns of some delegations might be met by applying to article 10 the possibility of variation by agreement under article 3.

78. Mr. ABASCAL ZAMORA (Mexico) said that serious problems could be created in an international credit transfer involving six or seven banks if the process were slowed down by an extra day at each stage.

79. Mr. SAFARIAN NEMATABADI (Islamic Republic of Iran) said that, since an extra day was being granted under article 6, it was unnecessary to grant a further day under article 10. He was thus in favour of adopting article 10(1) as it stood.

80. Mr. SKELEMANI (Observer for Botswana) said that an extra day was sometimes needed to cover situations in which a bank, for good reason, could not execute an order on the day on which it was received.

The meeting rose at 12.40 p.m.